

**STATE OF WISCONSIN  
SUPREME COURT**

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In the Matter of the Definition of the  
Practice of Law and the Unauthorized  
Practice of Law

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**SUPPLEMENT TO PETITION  
FOR SUPREME COURT RULE DEFINING  
MISSION OF PROPOSED COMMISSION**

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To: The Honorable Justices of the Wisconsin Supreme Court

The Board of Governors of the State Bar of Wisconsin, by George Burnett, its President, at the request of the Court, submits this Supplement to the State Bar's original Petition for Supreme Court Rule for the purpose of proposing a mission statement for the Commission which the State Bar's original petition requested the Court to appoint for the purpose of developing a new Supreme Court Rule which will define the practice of law and authorize the creation of an administrative body to assist in the administration of the Rule.

**PROPOSED MISSION STATEMENT**

**1. Frame of Reference for the Commission's Task.**

- a) The Role of Law in Society. Laws consist of constitutions, statutes, regulations, rules and court decisions. The "law" provides a basis for bringing order and a degree of certainty and predictability to our society and economy. This "order" is accomplished by the functioning of the three branches of our government, namely, the legislative, executive and judicial branches, and by the acceptance of the role of law by the members of society. The acceptance of the role of law by the members of society is based upon a premise that the law will be fairly and competently applied and administered to the members.
- b) Traditional Role of Lawyers in Society. As the United States was formed and evolved, lawyers (initially because of their training and experience and later on

because of the nature of their education) have been considered by society and by the government to be best suited to assist the persons who comprise society to cope with the application of the law to the manner in which persons and institutions function in society. Because of the importance of a properly functioning legal system to our society, it was accepted that only lawyers should be allowed to practice law. This role was accorded to lawyers because:

- i) The lawyer was considered to possess a special body of learning and special skills and techniques in the application of such learning. Lawyers undergo specialized training and education that are designed to qualify them to find the law, interpret the law and apply the law to situations that arise in our society and economy which are of interest to a member of society. In addition, lawyers are educated to engage in logical reasoning, to recognize and to foresee the consequences of a particular course of conduct or action to be taken by a member of society.
- ii) A person who is a lawyer does not "practice law" as a matter of right but only after the person has met standards established by the government<sup>\*</sup>. In Wisconsin, those standards are established by the Wisconsin Supreme Court. The establishment of such standards is designed, in part, to promote consumer confidence that attorneys possess a minimum level of competency and to provide accountability to the public by requiring that lawyers adhere to stringent professional rules of conduct.

The well-being of our society is dependent upon the competent administration and application of the laws which provide the framework for an orderly society. Lawyers who

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<sup>\*</sup> Hurst, *The Growth of American Law*, 1950.

practice law serve as a liaison between the members of society who are impacted by laws and the governmental bodies which make, execute and adjudicate the laws. The importance to society of that function served by lawyers who practice law would appear to be the basis for the intense regulation by the Wisconsin Supreme Court of persons who practice law. Under the regulatory scheme, only persons admitted by the Supreme Court can practice law in Wisconsin, and to be admitted requires a showing not only of competence but of good character and fitness (SCR 40). To continue to be able to practice law, lawyers must maintain their knowledge and skills (SCR 31), must be a member of an organized bar (SCR 10), must conform to certain rules of conduct designed to maintain the integrity of the legal profession and the interests of the person being served (SCR 20), and must submit to a disciplinary system that could result in the suspension or termination of a lawyer's right to practice law (SCR 11, 21 and 22).

Because who is allowed to practice law in Wisconsin has been deemed to be critical to the proper functioning of our society's legal system, it follows that there are good reasons to have clarification as to what kinds of activities and functions constitute the practice of law. The apparent goal of the Wisconsin Supreme Court's regulation of persons who practice law, which is to protect the interests of those members of society who become involved in the legal system, cannot be attained if there is significant uncertainty as to what constitutes the practice of law.

## **2. What Does or Should Constitute the Practice of Law?**

The question posed is difficult to answer. Early in the history of the country, persons who functioned as lawyers practicing law were viewed by many in society as those persons who had some kind of special knowledge or training regarding the "law."

Some activities, such as appearance in court on behalf of a client, have always been conceded to constitute the practice of law. However, outside of the courtroom, it has generally been much more difficult to clearly identify exactly what is the practice of law. As our society became more complex, as society became better educated, and as the needs of society and the economy produced more and more persons with specialized knowledge and training, the task of identifying activities that constitute the practice of law became more difficult to accomplish. The functions that perhaps should be the sole province of lawyers have to be evaluated by the Commission in the context of how society and its legal underpinnings and the consumers of services can best be served. In making its evaluation and in drawing its conclusions regarding the kinds of services that should be encompassed by a definition of the practice of law, the Commission shall consider the significance of the nature of a lawyer-client relationship which involves not only a responsibility for the lawyer to be competent but to act for a client in a manner that represents loyalty, independence of judgment, confidentiality and an absence of conflict of interest.

The problem is further complicated by the evolution of our society and economy. The increase in the educational level of the members of society and the tendency toward specialized roles for certain members of society has created a situation where, in some cases, non-lawyers may be in a position to competently provide services to members of society in areas which in the past had been considered to be best performed only by lawyers. Furthermore, it is obvious today that the legal needs of the members of society simply cannot be met by the persons who are authorized to practice law. To a certain extent this gap in service coverage is due to the economics of practicing law, and it is

unlikely the economics will change in either the near or distant future. The government will probably not be in a position to fill the gap in service. Thus, the only other way to close the service gap is for the legal profession and the Wisconsin Supreme Court to recognize that in our society and economy, today and in the future, some services and functions which may constitute the practice of law should be permitted to be performed in some cases by non-lawyers under the supervision of lawyers and in certain other appropriate instances by non-lawyers without such supervision so long as such services are provided competently and by qualified persons.

Although the role of a lawyer in today's society is in some important ways significantly different than the role of lawyers 100 or 200 years ago, the orderliness of society and the well-being of the members of society are still dependent upon the quality of the administration and application of the laws which constitute the framework of our society and economy. Lawyers, because of their particular education and training, and because of the standards that they must meet and maintain under the regulatory scheme to which lawyers are subjected, are best suited to engage in the practice of law. However, for lawyers to be able to function as they are expected to function within the legal system of our society, and for the Wisconsin Supreme Court to be able to develop some comfort that the members of society are being competently and ethically well served by those persons who engage in the practice of law, there does need to be some reasonable, pragmatic and contemporary clarification of the kinds of activities that constitute the practice of law and what portions of such practice may be performed by non-lawyers.

The Wisconsin Constitution has reserved to the Supreme Court the legal authority to regulate lawyers and to determine what constitutes the practice of law. In the absence

of a Supreme Court rule, what constitutes the practice of law is determined by the Court on a case-by-case basis. The uncertainty about what constitutes the practice of law which has resulted from the absence of a Supreme Court rule has created tension and conflict between lawyers and other service providers which is not in the best interest of society. In addition, the ambiguous situation has led to a proliferation of service providers who do not have the education and competence to provide services to society, some of whom are well-meaning and some of whom are charlatans and criminals, all to the emotional and financial detriment of those members of society who engage such a service provider.

Numerous professions and service providers are regulated by statute and administrative rules. Such regulation is premised on protection of the general public. In other words, the laws and regulations which regulate certain service providers who purport to have specialized skills are designed to set standards and to preclude the unqualified from providing the regulated service. In the context of such regulation, it is not unusual for the statute or regulation to define or describe the kinds of activities and functions that constitute the regulated activity. Chapter 441.001 of the Wisconsin Statutes defines what constitutes "nursing". Chapter 442.02 defines a certified public accountant. Chapter 443 defines what constitutes "landscape architecture", "land surveying" the practice of architecture and the practice of engineering. Chapter 446 defines the practice of chiropractic. Chapter 449 defines the practice of optometry.

The lack of clarity as to what constitutes the practice of law and the activities of unqualified and incompetent persons who engage in the unauthorized practice of law have been harmful to consumers of services not only in Wisconsin but also in other

states. The Supreme Court of the State of Washington recently created a rule which defines the practice of law and created a practice of law board to administer the rule.

Our society and economy are highly regulated today by various kinds of laws, rules and regulations, and as society and the economy become more complex and specialized, more regulation by law will follow. The application of the laws and regulations to members of society often involve issues which are critical to the social and economic well-being of the members. It is important that the members of society who seek assistance from third persons regarding the application of the law to them are able to have confidence that the information, advice and counsel received is delivered by a competent person.

### **3. The Mission of the Commission.**

The mission of the Commission is threefold:

First, to develop a pragmatic definition of the practice of law, which can be incorporated into a Wisconsin Supreme Court rule and which has the following characteristics:

- a) It reflects an identification by the Commission of the kinds of services which, in the best interests of society, are best performed by lawyers because of the significance and nature of the services, because of the special training, education and qualification of lawyers to provide the services, and because of the mandated duties and responsibilities of lawyers in a client relationship with respect to loyalty, independence of judgment, confidentiality and privileged communication.
- b) It reflects the fact that members of society have the right to personally handle their own legal affairs.

- c) It reflects the fact that because of the dynamic nature of the service economy and the tendency toward specialization in the economy, in certain situations non-lawyer service providers should be permitted to provide services (in some instances under the supervision of lawyers and in some instances without such supervision) which would constitute the practice of law under the definition so long as the services are provided by persons who have demonstrated the necessary competence to provide the services and such persons are accountable to the persons being served.
- d) It reflects the fact that due to the nature of society and the economy, due to the cost of the provision of legal services by a lawyer, and due to a lack of governmental assistance, a relatively large segment of society who need legal services will be unable to purchase such services in the marketplace.

In developing a definition of the practice of law, the Commission shall:

- a) Analyze the services traditionally provided by lawyers and the need for services which exists in the current state of society and the economy and identify those services which, in the best interest of society, should be provided by lawyers.
- b) Solicit input and commentary from current non-lawyer service providers who provide services that may constitute the practice of law.
- c) Solicit input and commentary from individuals and organizations which provide or assist in the provision of legal services to persons who are unable to purchase legal services in the marketplace.
- d) Solicit input and commentary regarding the problems arising out of the unauthorized practice of law from district attorneys, the Wisconsin Department of



Justice and the Wisconsin Department of Agriculture, Trade and Consumer Affairs.

- e) Review how other states have proceeded to define the practice of law and to deal with the unauthorized practice of law.

Second, to recommend a system for administering the new rule which defines the practice of law and a method for financing the cost of the administrative system. The system proposed shall provide an administrator with authority to deal administratively with situations that represent the unauthorized practice of law. The system proposed shall authorize the administrator to establish competency standards and to oversee the competency, and the methods of establishing the competency, of non-lawyer service providers who are authorized to provide services that constitute the practice of law. The system proposed should also include a procedure wherein out-of-state attorneys not licensed in Wisconsin could obtain *pro hac vice* admission on non-litigation-related matters, provided they agree to be bound by the Rules of Professional Conduct for Wisconsin attorneys.

Third, to develop a recommendation for amending Chapter 757.30 of the Wisconsin Statutes regarding the unauthorized practice of law, to make the statute consistent with the new rule defining the practice of law and establishing a system for controlling and penalizing the unauthorized practice of law which could involve civil remedies, criminal remedies and a basis for injured parties to obtain recompense.

Respectfully submitted on behalf of the Board of Governors of the State of Wisconsin  
this \_\_\_\_ day of \_\_\_\_\_, 2004.

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George Burnett, President  
State Bar of Wisconsin